

# SENATE BILL REPORT

## SB 5062

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As of November 28, 2011

**Title:** An act relating to providing agencies notice of a dispute under the public records act and an opportunity to cure error in the production of public records.

**Brief Description:** Concerning providing agencies notice of a dispute under the public records act and an opportunity to cure error in the production of public records.

**Sponsors:** Senators Pridemore, Swecker, Hatfield, Becker, Kastama, White, Tom, Parlette, Shin, Chase, Pflug and Holmquist Newbry; by request of Attorney General.

**Brief History:**

**Committee Activity:** Government Operations, Tribal Relations & Elections: 1/24/11.

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### SENATE COMMITTEE ON GOVERNMENT OPERATIONS, TRIBAL RELATIONS & ELECTIONS

**Staff:** Sharon Swanson (786-7447)

**Background:** The Public Records Act (PRA) requires that all state and local government agencies make all public records available for public inspection and copying unless they fall within certain statutory exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exemptions narrowly in order to effectuate a general policy favoring disclosure.

The PRA requires agencies to respond to public records requests within five business days. The agency must either (1) provide the records, (2) provide a reasonable estimate of the time the agency will take to respond to this request, or (3) deny the request. Additional time may be required to respond to a request where the agency needs to notify third parties or agencies affected by the request or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.

For practical purposes, the law treats a failure to properly respond as denial. A denial of a public records request must be accompanied by a written statement of the specific reasons for denial. Any person who is denied the opportunity to inspect or copy a public record may file a motion to show cause in superior court why the agency has refused access to the record. The burden of proof rests with the agency to establish that the refusal is consistent with the

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statute that exempts or prohibits disclosure. Judicial review of the agency decision is de novo and the court may examine the record in private.

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record must be awarded all costs, including reasonable attorney fees. In addition, the court has the discretion to award such person no less than \$5 and no more than \$100 for each day that person was denied the right to inspect or copy the public record. The court's discretion lies in the amount per day, but the court may not adjust the number of days for which the agency is fined.

**Summary of Bill:** When a person (requester) is denied an opportunity to inspect or copy a public record before filing an action in superior court, the requestor has the voluntary option first to present a public records claim to the agency.

Presentation of the public records claim provides up to 21 days for the agency to respond to the requester either by producing some or all the records requested or by rejecting all or part of the claim. During this 21-day period, the statute of limitations is tolled. An action filed in court within seven court days after the 21-day period, is deemed to be timely filed.

If the requester does not make a public records claim before filing an action in court, the agency has 30 calendar days from the date of service of the court action to produce the records previously denied. No penalty may be awarded for any record an agency produces during this 30-day period or during the 21-day period allowed for the public records claim.

Requirements for the contents of the public records claim and details of communication are specified.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:** PRO: This is a common sense approach. The agency is sometimes unaware of a problem, or does not understand the problem, until a lawsuit is filed. Once the lawsuit is filed, then liability attaches and the taxpayer is potentially liable. This is a non-attorney process but attorneys' fees are still available even if the agency produces the documents. There is legal recourse for the requester but none for the counties against those who would harass government, game the system, and engage in "gotchas." Civil deputies spend more time on PRA requests than on the Growth Management Account. Most requesters do contact the agency before they sue: the only burden this bill places is on the frivolous or "gotcha" requester. The Washington Supreme Court has ruled that a requester cannot be required to use a form. Penalties create incentives for playing games with the PRA.

CON: There should be language in section 2 that ends it. The Secretary of State or the State Auditor's Office should step in. Risk management would not allow the requester to go through records first. This is the most dangerous bill this session. The intent of the bill is to impede records requests. People will not get their records in time to defend themselves against governmental actions. A technical mistake should not be subject to the same penalties as an action that allows criminal activity to continue and injures the public. The act should be reformed. While the agencies are here in Olympia to tell their horror stories, people who make requests under the act have horror stories, too. When the information requested is necessary to make an informed decision at the ballot box, a 21-day wait may be too late. The \$5 per day penalty is the de facto standard penalty. If part of the PRA is taken away this year, that puts the rest of the act at risk in later years. The testimony of "gotchas" applies to the other side of the coin, too. This bill could be used to frustrate public records requests. Now records must be produced within 5 days or a deadline must be given. In the newspaper business, 21 days is not in time. For the average citizen, this bill is absolutely unworkable. The process is not under a judge's management or control. Allowing the judge to assess zero penalties would solve the problem without going to this bill.

**Persons Testifying:** PRO: Christina Beusch, Attorney General's Office; Brian Enslow, Washington State Association of Counties; Ramsey Ramerman, Washington Association of Public Records Officers.

CON: John Worthington, Arthur West, Rebecca Faust, citizens; Greg Overstreet, Allied Law Group; Bill Will, Washington Newspaper Publishers' Association; Rowland Thompson, Allied Daily Newspapers.